88-1094

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1988

No. 88-

LOIS W. POINIER, AS TRANSFEREE OF HELEN W. HALBACH, W. PAGE WODELL, AS TRANSFEREE OF HELEN WODELL HALBACH and ESTATE OF HELEN WODELL HALBACH, DECEASED, LOIS W. POINIER, EXECUTRIX,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether this Court should reconsider its six to three decision in *Jewett v. Commissioner*, 455 U.S. 305 (1982), in which the "reasonable time" for disclaiming a trust remainder interest free of Federal gift tax was held to commence upon creation of that interest, where (1) counsel for I.R.S. represented in oral argument before this Court in *Jewett* that the Commissioner of Internal Revenue had interpreted the 1958 regulation in issue consistently, (2) this Court's opinion therein accordingly relied upon such representation in stating that "[t]he Commissioner's interpretation of the Regulation has been consistent over the years and is entitled to respect", and (3) the Commissioner had in fact issued an inconsistent Private Letter Ruling in 1966 which allowed a disclaimant to wait for years before making a tax-free disclaimer?

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Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 30, 1988 with respect to the issue of whether Mrs. Halbach's Disclaimer constituted a taxable transfer under Section 2501 of the Internal Revenue Code.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reproduced at Appendix C. The opinion of the United States Tax Court is reported at 86 T.C.478 (1986) and is reproduced at Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was rendered and entered on September 30, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

I.R.C. § 2501. Imposition of Tax.

(a) TAXABLE TRANSFERS. -

(1) GENERAL RULE. -A tax, computed as provided in section 2502, is hereby imposed for each calendar quarter on the transfer of property by gift during such calendar quarter by any individual, resident or nonresident.

***

I.R.C. § 2511. Transfers in General.

(a) SCOPE. -Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of

the United States, shall apply to a transfer only if the property is situated within the United States.

***

Treasury Regulation § 25.2511-1(c), 26 C.F.R. § 25.2511-1(c): The text of 26 C.F.R. § 25.2511-1(c) is set forth at Appendix page A-1.

STATEMENT OF THE CASE

1. STATEMENT OF FACTS

Helen Wodell Halbach (the "Decedent") was born on August 29, 1890 to Parker Webster Page and Nellie A. Page. Decedent's father died January 22, 1937. Article Third of his will provided in part:

> If my wife, Nellie A. Page, survives me, I give, devise, bequeath and appoint all of said residue of my estate to my Trustees, hereinafter named, IN TRUST, to hold the same during the life of my wife Nellie A. Page and to invest and reinvest the principal and to apply the net income to her use. Upon her death I give, devise, bequeath and appoint the principal in equal shares to my daughters Helen Page Wodell and Lois Page Cottrell and if either of my daughters should then be dead to such persons and in such proportions as such daughter may by will duly admitted to probate legally appoint and in default of such appointment to such daughter's issue then surviving in equal shares per stirpes.

Nellie A. Page died on April 14, 1970 at the age of 100. She was survived by her two daughters, Decedent, age 79, and

Lois Page Cottrell, age 74, and by Decedent's two surviving children, Lois W. Poinier and W. Page Wodell, Petitioners herein.

On April 19, 1970, Decedent executed a "Disclaimer and Renunciation" (the "Disclaimer") of her remainder interest in the trust created by her father's will. In an action brought by the trustees for settlement of their account and for a determination of the validity and effect of Decedent's Disclaimer, the Superior Court of New Jersey held that the Disclaimer was timely executed and filed and was valid and effective under New Jersey Law. *In re Estate of Page,* 113 N.J. Super. 582, 274 A.2d 614 (Ch. Div. 1970). The decision was not appealed and became final and binding on the parties thereto. The Superior Court directed distribution of the remainder interest disclaimed by Decedent to W. Page Wodell and Lois W. Poinier.

On April 14, 1971, Decedent filed a Federal gift tax return, Form 709, for calendar year 1970. Decedent did not include the disclaimed remainder interest as a gift on this return.

Decedent died on August 5, 1972. The Federal estate tax return, Form 706, for Decedent's estate disclosed Decedent's Disclaimer, but the gross estate did not include the value of the disclaimed remainder interest.

By notice of deficiency dated April 30, 1976, respondent determined that Decedent's Disclaimer constituted a transfer made in contemplation of death under Section 2035.[1] The Tax Court determined that the Disclaimer constituted a

[1] Statutory references herein are to the Internal Revenue Code, 26 U.S.C., as in effect for the years in issue.

"transfer" under Section 2035, *Estate of Halbach v. Commissioner*, 71 T.C. 141 (1978), but that such transfer was not made in contemplation of death, *Estate of Halbach v. Commissioner*, T.C. Memo. 1980-309 (Docket No. 7099-76), so that no Federal estate tax was due under Section 2035. Because of the interrelated nature of the Federal estate and gift taxes (gift tax is deductible from the gross estate as a debt under Section 2053), the Federal estate tax case has been held in abeyance at the Tax Court pending the outcome of this case.

2. PROCEEDINGS BELOW

On June 25, 1981, I.R.S. issued a Notice of Deficiency to Decedent's Estate and Notices of Transferee Liability to Lois W. Poinier and W. Page Wodell asserting that Decedent's Disclaimer was a taxable transfer for Federal gift tax purposes.

On September 2, 1981, Petitioners filed Petitions in the United States Tax Court for redetermination of the deficiencies determined by the I.R.S. Tax Court jurisdiction existed pursuant to 26 U.S.C. § 7442 and § 6213. The Petitions denied that the Disclaimer was a taxable transfer for Federal gift tax purposes.

On March 27, 1986, the Tax Court filed an Opinion holding that Decedent's Disclaimer was a taxable transfer for Federal gift tax purposes. The Tax Court conceded that the Disclaimer was unequivocal and effective under state law but asserted that it was not timely under Treasury Regulation § 25.2511-1(c) because the "reasonable time" provision of that Regulation must be measured from the date of death of

the testator (in 1937) rather than from the date of the death of the life beneficiary (in 1970). The Tax Court's Opinion relied upon this Court's decision in *Jewett v. Commissioner*, 455 U.S. 305 (1982), in so holding.

On August 21, 1987, Decisions were entered by the Tax Court in accordance with its opinion of March 27, 1986. The Tax Court denied a timely filed Motion to Vacate Decision on November 3, 1987.

On January 27, 1988, Appellants filed their Notices of Appeal to the Court of Appeals for the Third Circuit.

In an Opinion filed on September 30, 1988, the Court of Appeals for the Third Circuit affirmed the decision of the Tax Court on the issue of whether Decedent's Disclaimer constituted a taxable transfer under the Federal gift tax by following this Court's decision in *Jewett v. Commissioner, supra.* The Third Circuit reversed the Tax Court, holding for Petitioners herein, on an issue of transferee liability.

REASONS FOR GRANTING THE WRIT

Summary

1. I.R.S. erroneously represented to this Court in the *Jewett* argument that it had never changed its mind about the interpretation of Treas. Reg. § 25.2511-1(c), when in fact it had issued a 1966 Letter Ruling directly contrary to the position it advocated in *Jewett.*

2. This Court relied on such erroneous representation in the *Jewett* majority opinion.

3. To leave the *Jewett* decision intact is to in effect condone and ratify the erroneous representation made to this Court by I.R.S. in the *Jewett* argument, a representation which may well have affected the six to three vote in *Jewett*.

4. In any event, the 1966 Letter Ruling establishes beyond any doubt that the regulation is so unclear that various I.R.S. employees cannot interpret it consistently. The regulation accordingly is not entitled to any respect or deference by the courts, and this Court's deference to the I.R.S. interpretation of that regulation in *Jewett* must obviously be reconsidered in light of that Ruling.

During 1970, the year of Decedent's Disclaimer, Section 2501(a)(1) imposed a Federal gift tax "on the *transfer* of property by gift *** by any individual ***" (emphasis added), and Section 2511(a)(1) stated that "the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, [and] whether the gift is direct or indirect ***."

Section 25.2511-1(c), Gift Tax Regs., provided for the year in issue that a disclaimer did not constitute a taxable "transfer" under the Federal gift tax if four conditions were satisfied. Two of those conditions are not in issue here, specifically, whether Decedent's Disclaimer was unequivocal and whether it was effective under local law. One condition, whether the remainder interest had been previously accepted by Decedent, was fully briefed below but was not reached by the Tax Court or the Third Circuit. The primary issue under the regulation is whether Decedent's Disclaimer was made "within a reasonable time after knowledge of the existence of the transfer."

In *Jewett v. Commissioner*, 455 U.S. 305 (1982), this Court held by a six to three vote that the word "transfer" in the above regulation referred to the original transfer of property to a testamentary trust under the will of the disclaimant's grandmother, not a subsequent transfer of property decades later to the disclaimant upon the death of the life income beneficiary.

Commentators have been highly critical of the majority opinion in *Jewett*. *See, e.g.*, Wolfson, *Disclaimers — A Device Whose Time Has Come?*, 43rd N.Y.U. Tax Institute § § 43.03[4], 43.06[1]; Glushakow-Smith, *Jewett v. Commissioner: Unforeseen Crisis of Disclaimers*, 14 Loyola U. L. Rev. 167. Justices Blackmun, Rehnquist, and O'Connor disagree with the majority opinion in *Jewett*, as their dissenting opinion therein shows. The United States Court of Appeals for the Eighth Circuit, which is the only Court of Appeals to have considered this issue en banc, disagrees with the majority opinion in *Jewett*. *Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980); *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973). Judge Harris, the dissenting judge at the Ninth Circuit level in *Jewett*, disagrees with the majority opinion in *Jewett*. *Jewett v. Commissioner*, 638 F.2d 96 (9th Cir. 1980).

Perhaps more importantly, in the argument before this Court of the *Jewett* case, the transcript reflects the following dialogue at pages 43 through 45:

> "QUESTION: Mr. Smith, when was it first made as clear as can be that the regulation means or meant what you now say it means? From the very time it was issued [1958]? Do you think that's the only possible reading of the regulation is the reading you give it?

MR. SMITH [Stuart A. Smith, Esq. of the Solicitor General's Office]: Well, one can read property to mean the actual property that one puts in one's pocket, but the gift and estate tax is replete with the fact that for 40 years it has subjected itself—the tax has been subject to a future interest as well.

QUESTION: Well, do you think you've answered my question or not?

MR. SMITH: Well, one can always read things differently, but it seems—

QUESTION: But the first part of my question was when did it become perfectly clear that the Commissioner administered the regulation the way he is now administering it?

MR. SMITH: I can't answer that question because of the paucity of cases. I suppose that it became perfectly, absolutely clear with authority when the Tax Court decided the Keinath case [1972] because that was the first case that really dealt with the disclaimers. But it seems to me that the words—

QUESTION: That case got to the Tax Court. It certainly had the seeds long before that.

MR. SMITH: Well, perhaps the paucity of litigation suggests that people were disclaiming within a reasonable time and, you know, there just weren't any cases. I would simply say that the words —

QUESTION: *At least the Commissioner didn't change his mind.*

MR. SMITH: *Absolutely not.*" (emphasis added)

Part V of the *Jewett* majority opinion accordingly stated as part of its rationale that "[t]he Commissioner's interpretation of the Regulation has been consistent over the years and is entitled to respect." 455 U.S. at 318. This is demonstrably untrue, as the I.R.S. in Private Letter Ruling 6612201590A (the text of which is reproduced beginning at Appendix page B-1) allowed a taxpayer with knowledge of an income interest for many years to disclaim free of gift tax. In that ruling, which is being discussed here not for its precedential value (but for its value in showing I.R.S. has been inconsistent, contrary to the representation made to this Court in the *Jewett* argument),[2] the settlor of the trust, Henry C. Fownes,[3] established an inter vivos spendthrift trust on December 7, 1933. Net income was payable to his daughter, Amy Fownes Schaeffer, during her life. Amy Fownes Schaeffer died January 4, 1936, survived by four children, Sara Mary Barnes Roby, Thomas Barnes II, John Barnes, Jr., and Amy Fownes Barnes Landeck. All four children received one-fourth of the trust's income from 1936 on.

One son died on April 17, 1963, the other died on March

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[2] Appellants are not relying upon the holding of that ruling for the purpose of arguing that it should be relied upon as "precedent" for the result Appellants desire the court to reach here, *see* Section 6110(j)(3), but rather are relying upon such ruling to show (1) that the regulation in issue has not been consistently applied over the years by I.R.S., contrary to its representation of its history of administration of the regulation before this Court, and (2) that such inconsistency has occurred because the regulation is so ambiguous and unclear. *See Rowan Companies v. United States*, 425 U.S. 247, 261 (n.17) (1981).

[3] The use of specific dates in the 1966 Letter Ruling permits recovery through LEXIS of the Pennsylvania Supreme Court opinion referred to in the ruling, thereby yielding additional information about the transaction in question (including such things as the settlor's name). *See Fownes Trust*, 421 Pa. 476 (1966); *In re Deed of Trust of Henry C. Fownes*, 465 Pa. 182 (1975).

16, 1964, and each son was survived by an adopted son. The issue then arose as to whether an adopted child qualified as "issue" so as to be able to receive income under the trust.

In a December 1963 Petition for Distribution filed with the Orphans' Court for Allegheny County, Pennsylvania, Paragraph 13 thereof noted that a "Fifth and Partial Account" for the trust was filed with the Court on October 31, 1963 and that "notice thereof together with notice of the time and place of audit" had been given to, among others, Sara Mary Barnes Roby and Amy Fownes Barnes Landeck, one of whom was the disclaimant in the 1966 Letter Ruling. The Supplemental Petition for Distribution, filed November 23, 1964, noted in Paragraph 6 thereof that "all of the parties in interest mentioned in the petition for distribution *** have been given written notice of the continued audit and hearing before the Orphans' Court on November 23, 1964."

In an opinion filed May 21, 1965, the Orphans' Court noted that "[t]he two surviving daughters of Amy Fownes Schaeffer [including the disclaimant] *** contend that ***" the adopted sons were not entitled to benefits under the trust. The Orphans' Court concluded that the daughters' position was correct. An appeal was argued before the Supreme Court of Pennsylvania on March 23, 1966. That court affirmed the Orphans' Court decision on May 24, 1966, and refused to hear reargument on June 23, 1966. *Fownes Trust*, 421 Pa. 476 (1966).

The disclaimant then, "[u]pon hearing of the Supreme Court decision," advised the trustee that she wished to disclaim. Private Letter Ruling 6612201590A, issued December 20, 1966, stated:

> [T]axpayer's *proposed* renunciation will not result in a taxable transfer of that interest for gift tax purposes to her natural children if such renunciation is executed within a "reasonable time" *from the time that she first received notice of the right to the additional income interest.* If the *proposed* execution is executed at the *present* time, the execution would be effected within a "reasonable time" *** (emphasis added)

Thus, even assuming that the disclaimant did not have the slightest notion that she was a contingent beneficiary under the trust she had been receiving income from since 1936 of the interests her sister and brothers held in the same trust, which assumption is hard to believe, and even assuming that the disclaimant had not been sufficiently enlightened by the prior four accountings under the trust, which is also hard to believe, nevertheless it is quite clear that she knew about her contingent interest for *over three years* before she disclaimed it, from October of 1963 to sometime after December 20, 1966. This is clearly not a "reasonable time" within the I.R.S. interpretation of the regulation at issue (although it could be argued that the 1966 authors of the letter ruling were certainly more in tune with the intent of the 1958 regulation drafters than later generations of I.R.S. employees have been).

Moreover, the facts surrounding the 1966 Letter Ruling made quite clear that the disclaimant exercised "control" over the property that she disclaimed, within the interpretation of "control" of this Court in *Jewett.* After the Pennsylvania Supreme Court's decision became final, and thus after the disclaimant was sure that no property that she disclaimed would go under that decision to her two brothers' adopted sons, the disclaimant executed her disclaimer. This is exactly the type of "wait and see", exercise of control planning which the Tax Court and this Court admonished against in *Jewett,*

this Court's *Jewett* opinion having quoted with approval the following passage from the Tax Court's opinion in *Jewett* (455 U.S. 318-319):

> "The petitioner possessed, for 24 years, the effective right to determine who should ultimately receive the benefits of a 50-percent remainder interest of a trust which, in 1972, had a corpus of approximately $8 million. He waited to act in respect of that remainder interest until the surviving life beneficiary was over 70 years of age and until he himself was 45 and, it appears, a man of substantial means. In 1972, by the execution of two disclaimers, he elected to let the property pass according to the alternative provisions of his grandmother's will—to the natural objects of his bounty. This, we hold, was an exercise of control over the disposition of property subject to the gift tax imposed by section 2501."

Similarly, the disclaimant in the 1966 Letter Ruling waited to see for sure who would get the property that she was contemplating disclaiming and then in fact disclaimed only after it was certain that her brothers' adopted sons would not take any of the disclaimed property. Assuming *arguendo* one agrees with this control rationale, the exercise of control was just as present in the 1966 Letter Ruling as it was in *Jewett*.

Note also that the last paragraph of the 1966 Letter Ruling states as follows (emphasis added):

> Since the proposed disclaimer of trust income by the taxpayer would be effective and irrevocable under local law, the taxpayer would not be required to include in her gross income, under section 652(a)

> of the Code, the income subsequently accruing to the trust. *However, income accrued to the trust which would be distributable to the taxpayer before she makes her disclaimer will be includible in her gross income, notwithstanding,* [*sic*] *the fact that it is actually paid to her children.* Revenue Ruling 64-62, C.B. 1964-1 (Part 1) 221.

Thus, just as in *Fuller v. Commissioner*, 37 T.C. 141 (1961), the disclaimant in the 1966 Letter Ruling had the right to receive income from the trust and subsequently disclaimed. And as Justice Blackmun noted in his dissent in *Jewett*, *Fuller* was the base upon which all the later Tax Court decisions rested. 455 U.S. at 326-327. Although in *Fuller* the income actually had been received for a long period of time, nevertheless ownership of the income interest for any period sufficient to include its income in her taxable income should have been fatal to the disclaimant in the 1966 Letter Ruling under the current I.R.S. interpretation of the regulation. It is difficult to conceive of a sound analysis that permitted that disclaimant to escape free of tax while subjecting the Decedent in this case to tax.

The implications of this ruling are accordingly enormous. How could I.R.S. have contended before this Court that the regulation had been consistently applied?[4] How can I.R.S. argue that a regulation like this, and the I.R.S. interpretation of that regulation, ought to be given deference and respect by the courts? How can I.R.S. hold taxpayers to a regulatory standard that various I.R.S. employees couldn't even interpret consistently? How can I.R.S. even suggest, as was done on brief before this Court,[5] that a disclaimer made

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[4] Transcript at 43-45, *Jewett v. Commissioner*, *supra*.

[5] Brief for the I.R.S. at 38-39, *Jewett v. Commissioner*, 455 U.S. 305 (1982).

shortly after the 1958 regulation change would have been more defensible, since that argument assumes that the regulation was clear enough to put taxpayers on notice that the standard had changed to what I.R.S. now says it is?

In baseball, the call on a tie at first base goes to the runner. In law, the validity of a regulation gets the benefit of the doubt from the courts. But I.R.S.'s position under this regulation has been murky, inconsistent, and quite unfair to these taxpayers. The 1966 Letter Ruling is the smoking pistol that ultimately proves how unfair I.R.S.'s position has been. If I.R.S. can't consistently tell what the regulation says, how can a decision be entered against Petitioners and other taxpayers under it?

This Court has the power to right this wrong. The 1966 Letter Ruling gives this Court the opportunity to revisit its *Jewett* analysis. The following are accordingly the reasons why certiorari should be granted:

1. I.R.S. erroneously represented to this court in the *Jewett* argument that it had never changed its mind about the interpretation of Treas. Reg. § 25.2511-1(c), when in fact it had issued a 1966 Letter Ruling directly contrary to the position it advocated in *Jewett*.

2. This Court relied on such erroneous representation in the *Jewett* majority opinion.

3. To leave the *Jewett* decision intact is to in effect condone and ratify the erroneous representation made to this Court by I.R.S. in the *Jewett* argument, a representation which may well have affected the six to three vote in *Jewett*.

4. In any event, the 1966 Letter Ruling establishes beyond any doubt that the regulation is so unclear that various I.R.S. employees cannot interpret it consistently. The regulation accordingly is not entitled to any respect or deference by the courts, and this Court's deference to the I.R.S. interpretation of that regulation in *Jewett* must obviously be reconsidered in light of that Ruling.

It would be quite reasonable for this Court to hold that although the transfer rationale of *Jewett* may have been correct, the history and ambiguity of the regulation, coupled with the Service's own inconsistency in the 1966 Letter Ruling, require that this regulation be struck down as invalid and an abuse of discretion. As a result, the taxability of Decedent's Disclaimer would be decided under the rule of *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933) (which constituted an exception for disclaimers to the general gift tax rules), as the drafters of the 1958 regulation intended (see the discussion of the Technical Memorandum in the *Jewett* case at 455 U.S. 313-315). This is one of the infrequent turning points in the evolution of an issue where a bold, critical reevaluation of position by a tribunal makes sense. Even more, justice would be rendered.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 30, 1988.

Dated: December 28, 1988

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies each of the foregoing paper and of its related Appendix were served by U.S. Certified Mail on (1) Solicitor General, Department of Justice, Washington, D.C. 20530 and (2) Francis M. Allegra, Esq., Appellate Section, Department of Justice, Tax Division, Tenth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20530, by mailing the same on December 28, 1988 in a postage-paid wrapper addressed to each of them.

GEOFFREY J. O'CONNOR, ESQ.

APPENDIX A

TREASURY REGULATION SECTION 25.2511-1(c)

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. *** *Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer.* The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of ownership of property after its acceptance. *** In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. In illustration, if Blackacre was devised to A under the decedent's will (which also provided that all lapsed legacies and devises shall go to B, the residuary beneficiary), and under the local law A could refuse to accept ownership in which case title would be considered as never having passed to A, A's refusal to accept Blackacre within a reasonable time of learning of the devise will not constitute the making of a gift by A to B. *** [emphasis added]

APPENDIX B

PRIVATE RULING 6612201590A

"This document may not be used or cited as precedent. Section 6110(j)(3) of the Internal Revenue Code."

SECTION 2511.
Transfers in General (Gift v. Not a Gift)

DATE: December 20, 1966

REFER REPLY TO: T:M:EG

REFERENCE

This refers to your letter of September 16, 1966, and prior correspondence, wherein you request a ruling with respect to the Federal gift tax and income tax consequences of a proposed renunciation by the above-named taxpayer of an income interest in a trust, described below, with respect to which she is presently a joint income beneficiary.

You ask whether the proposed disclaimer would be deemed a taxable gift under the provisions of section 2511 of the Internal Revenue Code of 1954. You also ask whether the income accruing to the disclaimed interest should be taxable to her under sections 652 and 662 of the Code.

*** created an inter vivos spendthrift trust on December 7, 1933. The trust instrument provided for net income of the trust to be paid to the taxpayer's mother, *** during her life.

Paragraph SECOND(b) of the trust provides, in part, the following:

"Upon the death of said *** the trustees shall pay in convenient periodic installments not less frequently than quarterly the net income of the trust estate, share and share alike, to the children of said *** who survive her and to the issue per stirpes of any child who may have predeceased her or not having predeceased her may die before the termination of the trust herein created."

Under paragraph SECOND(d), the trustor directed that the trust terminate 21 years "after the death of the last survivor of the children now living of said *** and the Trustees shall thereupon divide the principal of the trust estate remaining after all proper charges as herein provided for and pay the same share and share alike among the grandchildren and the issue per stirpes of any deceased grandchild of said ***

The trustor died on September 27, 1935. *** died on January 4, 1936, survived by four children, *** Each of *** children received a one-quarter share of the trust income following her death.

*** died on April 17, 1963, and *** died on March 16, 1964, each survived by adopted sons. The Supreme Court of Pennsylvania held in an opinion entered on *** (appeal of ***), that the adopted sons were not entitled to succeed to the respective interest of their adopted fathers. Petition for reargument was denied on June 23, 1966. As a result of this decision, one-half of the income interests of the adopted sons became payable to *** the taxpayer, and one-half to *** Upon hearing of the Supreme Court decision, the taxpayer, through her attorneys, advised the trustee that she wished irrevocably and unqualifiedly to refuse to accept *** income interest provided she could do so under Pennsylvania law. Counsel for the trustee subsequently advised her that she

could. You also indicate that the taxpayer never accepted dominion and control over any portion of *** interest. The trustees have retained all sums accruing with respect to that interest in a reserve account.

Section 2511(a) of the 1954 Code provides, in part, that the gift tax pertains to gifts indirectly made. On the other hand, section 25.2511-1(c) of the Gift Tax Regulations provides that "Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent ..., a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance. ...In any case where a refusal is purported to relate only to a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law."

An income beneficiary of a spendthrift trust may renounce a portion of that income interest under the law of Pennsylvania. See Gallagher v. Smith, 223 F.2d 218 (1955).

The trustor expressed his intent to have the income interest of his grandchildren devolve to their issue, we construe the intent of the trustor to provide that any renounced income interest by the grandchildren shall pass to their natural children.

In view of the foregoing, it is held that taxpayer's proposed renunciation will not result in a taxable transfer of that interest for gift tax purposes to her natural children if such renunciation is executed within a "reasonable time" from the time that she first received notice of her right to the additional income interest. If the proposed renunciation is executed at the present time, the execution would be effected within a "reasonable time" within the meaning of section 25.2511-1(c) of the regulations. Cf. Kathryn S. Fuller v. Commissioner, 37 T.C. 147 (1961). As indicated above, the taxpayer has not accepted the subject interest at the present time.

Section 652(a) of the Internal Revenue Code provides, in part, that the amount of income for the taxable year required to be distributed currently by a trust shall be included in the gross income of the beneficiary to whom the income is required to be distributed, whether distributed or not.

Section 301.3 of Title 20 of Purdon's Pennsylvania Statutes Annotated permits an income beneficiary of a Pennsylvania spendthrift trust to release or disclaim his right to income from the trust, provided that such released or disclaimed income passes to one or more of the beneficiary's descendants. The trust income proposed to be disclaimed by the taxpayer in the instant case would pass to her children.

Since the proposed disclaimer of trust income by the taxpayer would be effective and irrevocable under local law, the taxpayer would not be required to include in her gross income, under section 652(a) of the Code, the income subsequently accruing to the trust. However, income accrued to the trust which would be distributable to the taxpayer before she makes her disclaimer will be includible in her gross

income, notwithstanding, the fact that it is actually paid to her children. Revenue Ruling 64-62, C.B. 1964-1 (Part 1) 221.

Very truly yours,
(Signed) Lester H. Wallace
Acting Chief, Estate and Gift Tax Branch

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1087

LOIS W. POINIER, as Transferee
of HELEN WODELL HALBACH,
Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

No. 88-1088

W. PAGE WODELL, as Transferee of
HELEN WODELL HALBACH,
Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

No. 88-1089

ESTATE OF HELEN WODELL HALBACH,
Deceased, LOIS WODELL POINIER, Executrix
Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE DECISIONS OF THE
UNITED STATES TAX COURT

(Tax Court Docket Nos. 23881-81,
23882-81 & 23883-81)
Argued: July 26, 1988
Before: GIBBONS, *Chief Judge*,
SEITZ and HUTCHINSON,
Circuit Judges

(Opinion Filed: September 30, 1988)

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OPINION OF THE COURT

GIBBONS, *Chief Judge*:

Lois W. Poinier, as transferee of Helen W. Halbach, W. Page Wodell, as transferee of Helen W. Halbach, and Louis W. Poinier, executrix of the estate of Helen W. Halbach, appeal from a Tax Court decision 1) that Helen W. Halbach made a transfer subject to a gift tax, 2) that her children are liable as donee transferees, and 3) that her children are liable for interest, beyond the value of the gift, accrued since the respective notices of transferee liability. The petitioners claim that no taxable transfer was made by Helen W. Halbach, but that if there was such a transfer, the limit of their liability as transferees is the value of the gift. We will affirm the Tax Court ruling that Helen W. Halbach made a taxable transfer. We will reverse the ruling that the transferees are liable for interest in excess of the value of the gift.

I

Parker Webster Page, a resident of New Jersey, died in January of 1937. His will established a trust, the income of which was payable to his wife, Nellie A. Page, for life, with the remainder in equal shares to his daughters, Helen Page Wodell and Lois Page Cottrell. Helen Page Wodell later became Helen W. Halbach. She is the alleged transferor. The relevant paragraph of the will reads:

> If my wife, Nellie A. Page, survives me, I give, devise, bequeath and appoint all of said residue of my estate to my Trustees, hereinafter named, IN TRUST, to hold the same during the life of my wife Nellie A. Page and to invest and reinvest the principal and to apply the net income to her use.

> Upon her death I give, devise, bequeath and appoint the principal in equal shares to my daughters Helen Page Wodell [Halbach] and Lois Page Cottrell and if either of my daughters should then be dead to such persons and in such proportions as such daughter may by will duly admitted to probate legally appoint and in default of such appointment to such daughter's issue then surviving in equal shares per stirpes.

Mr. Page's wife Nellie and his daughters Helen and Lois were named as trustees. Nellie renounced her right to act as trustee, but her two daughters qualified. They acted as the only trustees until December 16, 1965, when they designated the Summit and Elizabeth Trust Company as a third trustee. These three trustees served until Nellie Page died on April 14, 1970 at the age of 100. Nellie was survived by both Helen Halbach, then 79, and Lois Cottrell, then 74. Also surviving were Helen's children, Lois Poinier and W. Page Wodell, as well as Lois' three children.

In 1944 Lois Cottrell, and in 1945 Helen Halbach, released their testamentary powers of appointment under their father's will, except to the extent that they each reserved the power to appoint within the class of their respective descendants and spouses. Thus when their mother died on April 14, 1970 they both retained a limited power of appointment. On April 19, 1970 Helen, and on April 30, 1970 Lois, renounced all rights in the residual trust under their father's will. As of April 19, 1970, the fair market value of the remainder which Helen renounced was $10,450,623.41. An action was filed in the New Jersey Superior Court to determine the validity of these renunciations. That court held that they were timely under New Jersey law, since the remainder did not become possessory until the April 14, 1970 death of Nellie Page. The court ordered distribution of the residue to the children of Helen and

Lois. *In re Estate of Page*, 113 N.J. Super. 582, 274 A.2d 614 (Ch. Div. 1970). Neither Helen nor Lois included the value of the residue in a gift tax return. Helen died on August 5, 1972.

In the early 1970's the Commissioner of Internal Revenue determined that Lois Cottrell owed additional gift tax in the amount of $4,639,402.50 due to her renunciation of the residual interest. The Tax Court held that because the renunciation was not made within a reasonable time after knowledge of the existence of the transfer, a taxable gift was made. *See* Treas. Reg. § 25.2511-1(c) (1958) (current version at 26 C.F.R. § 25.2511-1(c)). The Court of Appeals for the Eighth Circuit reversed, holding that the time to renounce does not begin to run until the remainder interest is "indefeasibly fixed in both quality and quantity." *Cottrell v. Commissioner of Internal Revenue*, 628 F.2d 1127, 1129 (8th Cir. 1980) (in banc) (quoting *Keinath v. Commissioner of Internal Revenue*, 480 F.2d 57 (8th Cir. 1973)). The Commissioner did not petition for certiorari. Thus neither Lois Cottrell as donor, nor her children as transferees, have ever paid a gift tax on her renunciation.

About three months after the *Cottrell* decision, the Court of Appeals for the Ninth Circuit declined to follow the Eight Circuit's *Keinath* rule as to timeliness of a renunciation. *Jewett v. Commissioner of Internal Revenue*, 638 F.2d 93 (9th Cir. 1980). The Supreme Court granted certiorari to resolve this conflict, and affirmed *Jewett*, thus rejecting *Keinath* and *Cottrell*. 455 U.S. 305 (1982).

On June 25, 1981, about three weeks after the Supreme Court granted certiorari in *Cottrell*, the Internal Revenue Service sent notices of gift tax deficiency to the executor of the estate of Helen W. Halbach, and of transferee liability to her children, Lois

Poinier and W. Page Wodell. There is nothing in the record before us which explains why the Internal Revenue Service waited until 1981 to pursue Helen's side of the family for gift tax, although they had pursued Lois ten years earlier.[1] The executor of Helen's estate and Helen's two children all filed petitions in the Tax Court seeking redetermination of the deficiency and transferee liabilities.

As might be expected, the Tax Court followed the Supreme Court's *Jewitt* decision, holding that Helen's renunciation was untimely under Treas. Reg. § 25.2511-1(c). Thus the court held that Helen's estate owed a gift tax of $4,881,386.52 plus interest from April 15, 1971 to date of payment. Since Helen's children each received $5,225,311.71 from their grandfather's trust, they were held liable to that extent as transferees for the deficiency and interest owed by the estate. The Tax Court also held the transferees liable for interest from and after the date of issuance of the notice of transferee liability on June 25, 1981. The court declined to consider whether certain prepayments made by the transferees in 1982 and 1983, which they designated as interest under Rev. Proc. 82-51, 1982-2 C.B. 839, should be so treated for income tax purposes. These appeals followed.

II

A. Time to Disclaim

The estate of Helen W. Halbach and the transferees urge that the *Jewitt* rule should not be applied because that case was wrongly decided. Whatever merit that argument might have if addressed to the Supreme

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1. The Internal Revenue Service assessed an estate tax on Helen's renunciation as a transfer in contemplation of death, but the Tax Court held that it was not made in contemplation of death, and thus no estate tax was due.

Court, it is not one that this intermediate appellate court may consider. Under *Jewitt*, the renunciation by Helen W. Halbach was a transfer subject to gift tax. We note the incongruity that the Cottrell side of the family, identically situated, has escaped gift tax liability. That incongruity, however, does not permit us to disregard binding precedent in our hierarchical court structure.

B. Transferee Liability

The transferees contend that, even if Helen W. Halbach owed gift tax, the Commissioner failed to carry the burden imposed by state law for the imposition of transferee liability on them. It is not disputed that the Commissioner has not established Helen's insolvency at the time of the transfer, or the amount of her assets at that time. See Section 4 of the Uniform Fraudulent Conveyance Act, 25 N.J. Stat. Ann. § 25:2-10 (West 1940); *Brown v. Commissioner of Internal Revenue*, 24 T.C. 256, 267 (1955), *acq.* 1955-2 C. B. 4. This argument is predicated on 26 U.S.C. § 6901(a) (1970),[2] which provides in relevant part:

> METHOD OF COLLECTION.
>
> The amounts of the following liabilities shall . . . be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which liabilities were incurred:
>
> (1) INCOME, ESTATE AND GIFT TAXES
>
> (A) Transferees
>
> The liability, at law or equity, of a transferee of property . . . .

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2. References are to the 1970 edition of the United States Code since the transfers were made in that year.

The transferees note that this section does not create a substantive liability, but cross-references to other law such as state fraudulent conveyance law. *See Commissioner of Internal Revenue v. Stern*, 357 U.S. 39, 42-44 (1958). While that is true, it is irrelevant, for 26 U.S.C. § 6324(b) (1970) provides in relevant part, that:

> unless the gift tax imposed by chapter 12 is sooner paid in full or becomes unenforceable by reason of lapse of time, such tax shall be a lien upon all gifts made during the period for which the return was filed, for 10 years from the date the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift.

This court has held, moreover, that donee liability is determined by federal, not state, law, and is not dependent upon the insolvency of the donor. *Baur v. Commissioner of Internal Revenue*, 145 F.2d 338 (3d Cir. 1944). Since a gift tax was due and unpaid, the donees are liable for its payment.

C. Interest

The federal gift tax in issue is a tax on the donor. 26 U.S.C. § 2502(d)(1970). It was due at the time fixed for filing a gift tax return. 26 U.S.C. § 6075, 6151 (1970). The "general rule" for interest on taxes states:

> If any amount of tax imposed by this title . . . is not paid on or before the last date prescribed for payment, interest on such amount at the rate of 6 percent per annum shall be paid for the period from such last date to the date paid.

26 U.S.C. § 6601 (1970). One of the "applicable rules" regarding interest provides:

> Interest prescribed under this section on any tax shall be paid upon notice and demand, and shall be assessed, collected and paid in the same manner as taxes. Any reference in the title . . . to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax.

26 U.S.C. § 6601(f)(1) (1970). Thus the donor, Helen W. Halbach, and her estate, owe interest from the due date of the gift tax return until the full amount of the tax is paid.

As we note in Part II B above, the donees are "personally liable for such tax to the extent of the value of such gift." 26 U.S.C. § 6324(b) (1970). The question we must address is the relationship between sections 6601(f)(1) and 6324(b). The donees concede that the second sentence of section 6601(f)(1) must be read into section 6324 so that donees are liable not only for the tax owed by the donor, but also for the interest owed by the donor. They urge, however, that when section 6601(f)(1) is thus read into section 6324(b), it is subject to the overall limitation of liability of "the value of such gift."

This limitation on donee liability is both consistent with the plain language of section 6324(b) and sensible. This court has held that since the donee of *any* gift is liable for unpaid gift tax, it does not matter that the gift to a particular donee was not itself taxable. *Baur v. Commissioner of Internal Revenue*, 145 F.2d 338 (3d Cir. 1944). Unless the value-of-the-gift limitation were held to be applicable to interest, a donee could be liable for interest on a gift to someone else in an amount exceeding the gift he received. The Commissioner does not urge, therefore, that a donee must pay the full interest owed by the donor on unpaid

gift tax even though the total exceeds the value of that donee's gift.

The Commissioner's position, accepted by the Tax Court, is that there is an entirely independent liability for interest, placed directly on the transferee, which arises at the time of service of a notice of transferee liability. This is not an easy argument to articulate, for unlike the donee liability provision in section 6324(b), the Commissioner can point to no specific code provision imposing such an independent liability on a transferee. As we noted in Part II B above, it is well established that the general transferee liability provision "neither creates nor defines a substantive liability but provides merely a new procedure by which the Government may collect taxes." *Commissioner of Internal Revenue v. Stern*, 357 U.S. 39, 42 (1958).

Prior to the Revenue Act of 1926, the federal government had no special mechanism for collecting taxes from transferees, but instead had to rely on the same measures available to any creditor. For example, if a corporation which owed taxes distributed its assets to stockholders or sold its assets to another corporation, thus rendering collection against it futile, the federal government had to resort to either a suit in equity against the transferee or, after obtaining a judgment against the transferror, proceed via a creditors bill to satisfy the judgment. *See* S. Rep. No. 52, 69th Cong., 1st Sess. (1926), *reprinted in* 1939-1 C. B. (Pt. 2) 332, 353-54. The Revenue Act of 1926 changed this, and permitted the government to assess and collect transferee liability "in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title." Revenue Act of 1926, ch. 27 § 280(a), 44 Stat. 9, 61.

The Senate version of the transferee liability provisions would not have imposed interest on the transferee for the period between the transfer and a

notice and demand following an adverse ruling by the Board of Tax Appeals. The transferee, however, would have to pay any interest accumulated prior to the transfer and also pay interest after notice and demand following an adverse ruling by the Board. S. Rep. No. 52, 69th Cong., 1st Sess. (1926), *reprinted in* 1939-1 C. B. (Pt. 2) 332, 355. The proposal was modified in conference, and the conference report explains:

> Under the amendment the liability of the taxpayer for the tax, including all interest and penalties, is fixed as of the time of the transfer of the assets. No further interest subsequently accrues upon such liability as assumed by the transferee, except the interest under section 276 (b) and (c) for failure to pay upon notice and demand after the outlined procedure has been completed and interest at 6 per cent a year for reimbursing the Government at the usual rate for loss of the use of money due it.

H.R. Rep. No. 356, 69th Cong., 1st Sess. (1926), *reprinted in* 1939-1 C.B. (Part 2) 361, 372.

Under the Revenue Act of 1926, then, there were three distinct interest calculations to be done in a case of transferee liability. First, the transferee's liability as of the date of the transfer (which might have included interest) had to be established. *See* Revenue Act of 1926, ch. 27, § 280(a)(1), 44 Stat. at 61. Second,

> [i]nterest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for payment of the tax . . . to the date the deficiency is assessed.

Revenue Act of 1926, ch. 27, § 274(j), 44 Stat. at 56. This interest calculation stopped as of the assessment

of deficiency and appears to be the provision to which the conference report referred in speaking of "6 per cent a year" as the "usual rate for loss of the use of money due" the government. The Act also provided for a third calculation of interest:

> Where a deficiency, or any interest or additional amounts assessed in connection therewith under subdivision (j) of section 274 . . . is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 1 per centum a month from the date of such notice and demand until it is paid.

Revenue Act of 1926, ch. 27, § 276(b), 44 Stat. at 57-58. Thus, under this Act, there was a separate interest calculation which ran from the date of notice and demand until the date of payment if the taxes were not paid within ten days of notice and demand.

As the law stood in 1970, however, there were no such separate calculations of interest. Instead, in the 1954 Code, Congress collapsed the separate provisions into one:

> If any amount of tax imposed by this title . . . is not paid on or before the last date prescribed for payment, interest on such amount at the rate of 6 percent per annum shall be paid for the period from such last date to the date paid.

26 U.S.C. § 6601 (a) (1970). This was not accidental. As the House Report explained:

> Subsection (a) of this section provides a general rule that interest at the rate of 6 percent shall run from the due date to the date paid in the case of any amount of tax which is not paid on the due date.
>
> . . .

> Under the provisions of this section, there is no interest on interest. Under existing law, in the case of deficiencies in income, estate or gift taxes, interest runs from the date prescribed for payment of the tax to the date of assessment of the deficiency and then interest on the amount assessed runs from the date of assessment.

H.R. Rep. No. 1337, 83rd Cong., 2d Sess., *reprinted in* 1954 U.S. Code Cong. & Admin. News 4017, 4565. The same language appears in the Senate Report. S. Rep. No. 1622, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4621, 5238. To drive the point home, the Code also states, "No interest under this section shall be imposed on the interest provided by this section." 26 U.S.C. § 6601(f)(2) (1970). The change was also reflected in the deficiency procedures which, unlike those adopted in 1926, simply do not have a provision for a separate interest calculation. *See* 26 U.S.C. §§ 6211-6216 (1970). Thus, despite the language in the 1926 legislative history, we know of no 1970 authority to impose an "independent liability" for interest after the notice of deficiency. Donees are liable for one type of interest: interest calculated from the day the gift tax was due until it is paid. An "independent liability" such as the Commissioner seeks would restore the interest on interest liability which was removed by Congress in 1954. Indeed, the Commissioner is contending for interest on $343,925.19 in interest.[3]

In deciding in favor of the Commissioner, the Tax Court relied on *Patterson v. Sims*, 281 F.2d 577, 580-81 (5th Cir. 1960), which held that a transferee is

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3. The gift tax deficiency was found by the Tax Court to be $4,881,386.52. The transferee liability (excluding the post-notice interest) was limited to $5,225,311.71, the value of the gift to each donee. The difference between these two figures is $343,925.19 in interest.

liable under federal law for post-assessment interest. That case is plainly distinguishable. It involved a provision in the 1939 Code which was virtually identical to section 276(b) of the Revenue Act of 1926, except with a different interest rate. *See* 26 U.S.C. §§ 292 and 294(b) (1940), 53 Stat. 1, 88-89. *Stein v. Commissioner of Internal Revenue*, 37 T.C. 945, 959-60 (1962), also cited by the Tax Court, is not distinguishable on this ground, since it did arise under the 1954 Code. However, *Stein* relied on *Patterson*, viewing §§ 6601 and 6901 of the 1954 Code as simply counterparts to §§ 294(b) and 311 of the 1939 Code. *Stein* did not note that the 1954 Code made relevant changes.

Even if these difficulties with relying on the legislative history of the Revenue Act of 1926 could be disregarded, there is a another major difficulty. The 1926 act simply had nothing to do with the limits of donee liability for gift taxes, because that act *repealed the gift tax*. Revenue Act of 1926, ch. 27, § 1200(a), 44 Stat. at 125-26.[4] It was concerned with the transfer of assets by someone who already owed taxes, not with transfers which themselves were taxable events. Even if the 1926 legislative history were authority for an independent liability for post-notice interest, it says nothing about whether this independent liability is also subject to the value-of-the-gift limitation. Neither *Patterson* nor *Stein*, the strongest support available, was a gift-tax case.

In the absence of explicit statutory authority or useful legislative history, the Commissioner is reduced to arguing that Congress could not have intended to

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4. Instead, Congress presumed that any transfer made within two years of death was made in contemplation of death. When the Supreme Court invalidated this "irrebuttable presumption," *Heiner v. Donnan*, 285 U.S. 312 (1932), Congress reenacted the gift tax. Revenue Act of 1932, ch. 209, §§ 501-532, 47 Stat. 169, 245.

encourage donees whose liabilities are already equal to the value of their gift to delay the payment of gift taxes as long as possible, and that we should read the 1954 Code creatively. It was not, however, patently unreasonable for Congress to limit the total liability of donees to the value of the gift received. The incentive to which the Commissioner refers arises only in the comparatively rare instance when the amount of the gift is exhausted by the tax due plus interest owed by the donor. That probably occurred here because the Internal Revenue Service, fully aware of the issue, and actually litigating against the Cottrell side of the family, delayed for ten years in asserting the gift tax against Helen W. Halbach's side. The equities favoring a creative rewriting of the 1954 Tax Code are not in this situation impressive.

III

The decision of the Tax Court, holding that the estate of Helen W. Halbach is liable for gift tax on her renunciation of the residual in her father's testamentary trust will be affirmed. The decision imposing transferee liability on Lois W. Poinier and W. Page Wodell to the extent of the value of the gift will be affirmed. The decision imposing interest on the transferee from the date of notice of transferee liability to the date of payment will be reversed.

SEITZ, Circuit Judge, concurring in part and dissenting in part.

I join the majority to the extent that it holds that the estate of Helen S. Halbach is liable for a gift tax and interest based on her untimely renunciation of the remainder interest in her father's testamentary trust. I also agree that her children are liable as donee transferees for such tax and interest up to the point where they aggregate the value of the gift. Furthermore, I am willing to agree with the majority, with misgivings, that the interest requirement ceased at the point when the cap was reached.

My difference with the majority is that I recoil from its implicit, but important holding, that no interest accrued here, even after the date the deficiency determination was made by the Tax Court. At that point, in my view, interest commenced to accrue on the amount of the judicially established tax deficiency. The situation is akin to a monetary judgment of any other court. Although it could be clearer, I believe the obligation is mandated by 26 U.S.C. § 6601. It is noteworthy that Bond Form 9, required to obtain a stay pending appeal of a deficiency determination, (App. 1 to the Rules of Practice of the Tax Court) provides for the payment of "the deficiency as finally determined, together with any interest ***."

It is inconceivable to me that Congress intended that a donee taxpayer, subject, in effect, to a Tax Court judgment, was to be given a free ride until the government obtained satisfaction of that judgment. At a minimum, I would limit the application of the cap to the period prior to the Tax Court's deficiency decision.

APPENDIX D

LOIS W. POINIER, AS TRANSFEREE OF HELEN WODELL HALBACH, ET. AL.,[1] PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 23881-81, 23882-81, 23883-81. Filed March 27, 1986.

[1]Cases of the following petitioners are consolidated herewith: W. Page Wodell, as Transferee of Helen Wodell Halbach, docket No. 23882-81; and Estate of Helen Wodell Halbach, Deceased, John Poinier, Executor, docket No. 23883-81.

Decedent held a remainder interest in a testamentary trust created in 1937 by the will of her father. On Apr. 19, 1970, only 5 days after the death of the life tenant, decedent executed a disclaimer of her remainder interest. *Held*, the disclaimer was not made within a reasonable time as required by sec. 25.2511-1(c), Gift Tax Regs., and thus constituted a taxable transfer under sec. 2511, I.R.C., 1954. *Jewett v. Commissioner*, 455 U.S. 305 (1982). *Held, further*, decedent's children are liable as donee-transferees under sec. 6324(b), I.R.C. 1954, for the deficiency in gift tax due from decedent. *Held, further*, under sec. 6324(b), donee-transferees' liability is limited to the value of the assets they received, *except* that this limitation does not apply to the interest that has accrued since the issuance of their respective notices of transferee liability. *Held, further*, any appropriate adjustments to which petitioner in docket No. 23883-81 may be entitled to with respect to estate tax refunds will be considered in the estate tax proceedings presently pending before the Court in docket No. 7099-76. *Held, further*, this Court is without jurisdiction either to offset the donee-transferees' liabilities by refunds of income taxes claimed to be due by them for previously paid income taxes, or to take into account in entering decisions herein certain prepayments made to respondent after the commencement of these proceedings.

Geoffrey J. O'Connor, for the petitioners.
Leslie J. Spiegel, for the respondent.

TANNENWALD, *Judge*: Respondent determined the following deficiencies/liabilities in petitioners' Federal gift taxes:

Docket No.	*Year*	*Deficiencies/liabilities*
23881-81	1970	$5,172,500.92
23882-81	1970	5,172,500.92
23883-81	1970	5,172,500.92

The issues for decision are: (1) Whether the disclaimer and renunciation made by decedent in 1970, of a remainder interest in the testamentary trust created by her father's will in 1937, constituted a taxable transfer under section 2511;[2] (2) in the event we find that a taxable transfer did take place, whether decedent's children who took by default under the terms of the trust because of decedent's dis-

[2]Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954 as amended and in effect during the years in issue, and all Rule references are to the Rules of Practice and Procedure of this Court

claimer, are each liable as a donee-transferee of the assets of decedent under section 6324(b), for the deficiency in gift tax due from her for the calendar year 1970; (3) in the event we find such liability does exist, whether the total liability of each donee-transferee, including interest under section 6601 on the underlying deficiency for the period subsequent to the issuance of their respective notices of liability, is limited to the value of the assets transferred to each, pursuant to section 6324(b); and (4) in the event that we find liability does exist, (a) whether this Court has jurisdiction to offset the gift tax deficiency determined against decedent's estate, and in turn the transferee liability of the donee-transferees, by estate tax refunds claimed to be due by the estate, (b) whether this Court has jurisdiction to offset the transferee liability of the donee-transferees by individual income tax refunds claimed to be due by them, and (c) whether this Court has jurisdiction to take into account in entering its decisions herein certain prepayments made to respondent after the commencement of these proceedings.

FINDINGS OF FACTS

These cases were submitted fully stipulated under Rule 122. This reference incorporates herein the stipulation of facts and attached exhibits.

Petitioner in docket No. 23883-81 is John Poinier, as executor of the Will of Helen Wodell Halbach (formerly Helen Page Wodell), deceased (the decedent). Mr. Poinier resided in Gladstone, New Jersey, at the time he filed his petition in this case. Petitioners in docket Nos. 23881-81 and 23882-81 are Lois W. Poinier and W. Page Wodell, respectively, as donee-transferees of the decedent.[3] At the time they filed their petitions in this case, Mrs. Poinier resided in Gladstone, New Jersey, and Mr. Wodell resided in Lyme, Connecticut.

Decedent was born on August 29, 1890, to Parker Webster Page and Nellie A. Page. Decedent's father died January 22, 1937, domiciled in Essex County, New Jersey. His will was admitted to probate on February 10, 1937, by the Surrogate's Court of Essex County. Article 3 of that will provided in relevant part:

[3]Pursuant to Rule 141(a), these cases were consolidated for trial, briefing, and opinion on Jan. 24, 1984.

If my wife, Nellie A. Page, survives me, I give, devise, bequeath and appoint all of said residue of my estate to my Trustees, hereinafter named, IN TRUST, to hold the same during the life of my wife Nellie A. Page and to invest and reinvest the principal and to apply the net income to her use. Upon her death I give, devise, bequeath and appoint the principal in equal shares to my daughters Helen Page Wodell and Lois Page Cottrell and if either of my daughters should then be dead to such persons and in such proportions as such daughter may by will duly admitted to probate legally appoint and in default of such appointment to such daughter's issue then surviving in equal shares per stirpes.

The trust was subject to, governed by, and interpreted pursuant to the laws of the State of New Jersey.

Nellie A. Page died on April 14, 1970, at the age of 100. She was survived by her two daughters, decedent, age 79, and Lois Page Cottrell, age 74, and by decedent's two surviving children, Lois W. Poinier and W. Page Wodell, petitioners in docket Nos. 23881-81 and 23882-81, respectively. Upon the death of Nellie A. Page, the trust terminated and decedent and her sister, Lois Page Cottrell, each became entitled to possession of half the remainder of the trust corpus.

On April 19, 1970, the decedent, being legally competent in all respects, executed (her signature being acknowledged before Coleman Burke, an attorney-at-law of the State of New Jersey) a document entitled "Disclaimer and Renunciation" (the disclaimer), which provided:

I, HELEN PAGE HALBACH (formerly Helen Page Wodell), residing at 49 Forest Drive, Short Hills, New Jersey, do hereby irrevocably disclaim and renounce all my right, title and interest as a remainderman of the trust established by my father, Parker Webster Page, in Paragraph THIRD of his Last Will and Testament, dated January 12, 1935, and admitted to probate by the Essex County Surrogate's Court on February 10, 1937.

As a result of the disclaimer, W. Page Wodell and Lois W. Poinier each became entitled to receive half of the assets comprising decedent's remainder interest in the trust. The fair market value on April 19, 1970, of the remainder interest disclaimed by decedent was $10,450,623.41.[4] In the

[4] In the respective notices of deficiency and transferee liability, respondent determined the fair market value of the gift to be $10,954,717.60, the fair market value of the assets in question on Apr. 14, 1970, the date of death of Nellie A. Page. The revised figure reflects respondent's concession that the proper valuation date was Apr. 19, 1970, the date of the

event that we find that decedent's disclaimer constituted a transfer subject to Federal gift tax, the fair market value of the assets transferred to Lois W. Poinier on April 19, 1970, was $5,225,311.71, and the fair market value of the assets transferred to W. Page Wodell on that date was also $5,225,311.71. On April 30, 1970, Lois Page Cottrell also executed a "Disclaimer and Renunciation," similar to the document executed by decedent.

On May 4, 1970, decedent's disclaimer and the "Disclaimer and Renunciation" of Lois Page Cottrell were delivered to the Summit and Elizabeth Trust Co., as co-trustee,[5] and were filed in the Surrogate's Court of Essex County on June 15, 1970. In an action brought by the trustees for settlement of their account and for a determination of the validity and effect of decedent's disclaimer and the "Disclaimer and Renunciation" of Lois Page Cottrell, the Superior Court of New Jersey held that the disclaimer was timely executed and filed, and was valid and effective under New Jersey Law. *In re Estate of Page*, 113 N.J. Super. 582, 274 A.2d 614 (Ch. Div. 1970). The decision was not appealed and became final and binding on the parties thereto. In its judgment dated December 23, 1970, settling the trustees' account in the above action, the Superior Court of New Jersey directed distribution of the remainder interest disclaimed by decedent to W. Page Wodell and Lois W. Poinier, and directed distribution of the remainder interest disclaimed by Lois Page Cottrell to her three children.

On April 14, 1971, decedent timely filed a Federal gift tax return, Form 709, for the calendar year 1970. Decedent did not include the value of the disclaimed remainder interest as a gift to her daughters on this return. Decedent died on August 5, 1972. Petitioner John Poinier timely filed a Federal estate tax return, Form 706, for decedent's estate

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disclaimer and alleged transfer, as well as the parties' agreement on other valuation issues raised by petitioners.

[5]Article 10 of the Will of Parker Webster Page appointed Nellie A. Page, decedent, and Lois Page Cottrell as trustees of the trust created thereby. Nellie A. Page subsequently renounced her right to so act. From the closing date of the account of decedent and Lois Page Cottrell as executrices of the Will of Parker Webster Page on Jan. 27, 1945, until Dec. 16, 1965, decedent and Lois Page Cottrell acted as sole trustees of the testamentary trust. On Dec. 16, 1965, they appointed Summit and Elizabeth Trust Co. as co-trustee, and all three acted as trustees from that date until termination of the trust.

on May 3, 1973, with the Office of the District Director, Internal Revenue Service, Newark, New Jersey. On that return, decedent's disclaimer was disclosed, but the gross estate did not include the value of the disclaimed remainder interest. Petitioner John Poinier, however, did pay to the Internal Revenue Service the total sum of $320,066.89, the tax shown to be due on the return.

By notice of deficiency, dated April 30, 1976, respondent determined that decedent's disclaimer constituted a transfer made in contemplation of death under section 2035, as in effect on the date of decedent's death. This Court determined that the disclaimer constituted a "transfer" within the meaning of that term as used in section 2035, *Estate of Halbach v. Commissioner*, 71 T.C. 141 (1978) (docket No. 7099-76), but that such transfer was not made in contemplation of death. *Estate of Halbach v. Commissioner*, T.C. Memo. 1980-309 (docket No. 7099-76). Pursuant to a joint motion by the parties and an order of this Court, no final decision has been entered in that case, pending the outcome of these cases.

OPINION

The central issue for decision is whether decedent's disclaimer constituted a taxable transfer under section 2511. Section 2501(a)(1) provides that "A tax * * * is hereby imposed for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident." Section 2511(a), in defining the scope of what constitutes such a transfer, is broad and provides, in relevant part, that "Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is *direct or indirect.*" (Emphasis added.)

To determine whether a disclaimer qualifies as an indirect gift,[6] we turn to section 25.2511-1(c), Gift Tax Regs., which provides that:

> Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and

[6] Sec. 2009(b)(1) of the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, 1893, added sec. 2518 which sets forth the requirements necessary for a disclaimer not to constitute a taxable transfer. The provision only applies to disclaimers made after Dec. 31, 1976.

unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), *a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law.* There can be no refusal of ownership of property after its acceptance. * * * In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. * * * [Emphasis added.]

There is no question that decedent's disclaimer was unequivocable in nature and effective under New Jersey State law. Thus, our inquiry focuses solely on whether the disclaimer was made "within a reasonable time after knowledge of the existence of the transfer." To this end, petitioners asks us to find that the transfer took place upon the death of the life tenant (Nellie A. Page), when the remainder interest first became possessory in nature, and that the disclaimer, made only 5 days later, was therefore made within a reasonable period of time. Respondent, on the other hand, asks us to hold that the transfer took place when the remainder interest was first created upon the death of Parker Webster Page in 1937, some 33 years before the disclaimer was made, and was therefore not made within a reasonable period of time. For the reasons set out below, we agree with respondent.

In essence, petitioners urge us to revisit *Jewett v. Commissioner*, 455 U.S. 305 (1982), wherein the Supreme Court upheld respondent's position herein by holding, on practically identical facts, that the "reasonable time" period contained in the regulations is to be measured from the time a remainder interest is created and not from the time it becomes possessory. Petitioners ask us to distinguish *Jewett* on two grounds. First, petitioners point to the fact that before *Jewett* was decided by the Supreme Court, decedent's sister, Lois Page Cottrell, was successful in having her disclaimer, executed at approximately the same time as that of decedent, declared timely by a decision of the Eighth Circuit Court of Appeals in *Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980), revg. 72 T.C. 489 (1979) (which decision became final before *Jewett* was

decided), and thus escaped any gift tax liability. While we can understand the frustration of decedent's children—frustration which we are satisfied decedent would share if she were alive—at the fact that another branch of the family takes its share of the trust free of gift tax liability, we are unable to assuage that frustration by a favorable decision herein. A prior Circuit Court of Appeals decision contrary to a Supreme Court's decision is of no avail to a taxpayer even where he can prove reliance (which obviously is not present herein). *C. Blake McDowell, Inc. v. Commissioner*, 71 T.C. 71 (1978), affd. 652 F.2d 606 (6th Cir. 1980), and cases therein discussed. The fact that the other taxpayer was decedent's sister and that both disclaimers affected interests in the same trust is simply irrelevant. Second, petitioners argue that the Supreme Court was in error when it stated that "The Commissioner's interpretation of the Regulation has been consistent over the years and is entitled to respect." *Jewett v. Commissioner*, *supra* at 318. To support their view that this statement was incorrect, and thus the Supreme Court's underlying rationale was faulty, petitioners submitted for our review Private Letter Ruling 6612201590A, dated December 20, 1966, to persuade us that respondent has not consistently applied the regulation over the years. Petitioners are grasping at straws. We are satisfied that even if the Supreme Court had been aware of this private ruling to another taxpayer, it would not have been persuaded to reach a different conclusion in *Jewett*.

In sum, we hold that since it is conceded that decedent had knowledge of the creation of the remainder interest in her favor at the time of the death of Parker Webster Page in 1937, the disclaimer was untimely and the transfer thereby accomplished was subject to gift tax.[7]

We now turn to the issue of the liability of petitioners Lois W. Poinier and W. Page Wodell, children of decedent, as donee-transferees of the trust assets, for the deficiency in

[7] See also *Kennedy v. Commissioner*, T.C. Memo. 1986-3. In view of this holding, we need not address respondent's alternative contention that a loan of $6,000 made by the trustees to decedent on Feb. 10, 1958, and later forgiven by decedent's children as a gift to her, evidenced an actual acceptance of the transfer prior to the disclaimer which would invalidate the disclaimer under sec. 25.2511-1(c), Gift Tax Regs., because "There can be no refusal of ownership of property after its acceptance."

gift tax due from decedent's estate for the calendar year 1970.

Section 6324(b) provides, in relevant part, that:

> unless the gift tax imposed by chapter 12 is sooner paid in full or becomes unenforceable by reason of lapse of time, such tax shall be a lien upon all gifts made during the period for which the return was filed, for 10 years from the date the gifts are made. If the tax is not paid when due, *the donee of any gift shall be personally liable for such tax to the extent of the value of such gift.* * * * [Emphasis added.]

Section 6901(a) provides, in relevant part, as follows:

> SEC. 6901(a). METHOD OF COLLECTION.—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:
>
> (1) INCOME, ESTATE, AND GIFT TAXES.—
>
> (A) TRANSFEREES.—The liability, at law or in equity, of a transferee of property—
>
> * * * * * * *
>
> (iii) of a donor in the case of a tax imposed by chapter 12 (relating to gift taxes),

Petitioners seek to impose the same standard with respect to their liability as transferees for any gift tax as exists in respect of transferee liability for income taxes under section 6901. That standard is based upon the proposition that section 6901 "neither creates nor defines a substantive liability but provides merely a new procedure by which the Government can collect taxes." *Commissioner v. Stern*, 357 U.S. 39, 42 (1958). The nature and extent of that liability is a question of State law (*Commissioner v. Stern*, *supra* at 45) and the burden is on the respondent (sec. 6902(a)) to show: (l) A transfer of property to the transferee; (2) the transfer was made for inadequate consideration; (3) the transferor was insolvent at the time, or as a result of the transfer; (4) the value of the property transferred; and (5) the tax found to be owed by the transferor has not been paid. *Alonso v. Commissioner*, 78 T.C. 577, 580 (1982).

The difficulty with petitioners' position is that it ignores the direct liability imposed upon a donee by section 6324(b). Thus, the liability of petitioners herein is predicated upon Federal, not State, law and the solvency of the transferor is

irrelevant.[8] *Mississippi Valley Trust Co. v. Commissioner*, 147 F.2d 186, 187-188 (8th Cir. 1945), affg. a Memorandum Opinion of this Court; *Baur v. Commissioner*, 145 F.2d 338, 340 (3d Cir. 1944), affg. 2 T.C. 1016 (1943). Cf. *Commissioner v. Stern*, *supra* at 43 n. 3; *Schuster v. Commissioner*, 312 F.2d 311, 314-316 (9th Cir. 1962), affg. on this issue 32 T.C. 998 (1959).[9] As to the other elements required to impose direct liability on petitioners under section 6324(b), there is no doubt that petitioners Lois W. Poinier and W. Page Wodell did in fact receive their equal shares of the trust assets disclaimed by decedent without consideration, and therefore, in light of our finding that the execution of the disclaimer effected a taxable transfer, it is clear that these petitioners were donees and accordingly transferees under section 6901(b). Thus, upon decedent's failure to pay the gift tax due on these transfers, these petitioners each became liable for such tax, to the extent of the value of the gift received by them, under section 6324(b). Respondent, in turn, is empowered to assess and collect this tax pursuant to section 6901(a).[10]

We now turn to what the extent of this liability is with respect to petitioners Lois W. Poinier and W. Page Wodell (hereinafter referred to as "petitioner-donee-transferees"). Section 6324(b) provides that "If the tax is not paid when due, the donee of any gift *shall be personally liable for such*

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[8] Similarly irrelevant is any consideration of an offset of the value of the transferor's retained assets at the time of transfer. See *Scott v. Commissioner*, 70 T.C. 71, 85 (1978).

[9] In their reply briefs, petitioners Lois W. Poinier and W. Page Wodell argue that we lack jurisdiction with respect to the donee liability issue because respondent failed to assert such liability in petitioners' notices of transferee liability. We find petitioners' claim to be without merit. In each of the notices, respondent specifically stated that each petitioner's alleged liability arose because "The gift tax liability for the calendar year ended December 31, 1970 has not been discharged by the donor." We think such language, read within the context of each notice, clearly communicated to each petitioner that respondent was asserting donee liability. *Bos Lines Inc. v. Commissioner*, 354 F.2d 830, 834-835 (8th Cir. 1965), affg. a Memorandum Opinion of this Court; *Estate of Mandels v. Commissioner*, 64 T.C. 61, 75-77 (1975). Moreover, we note that petitioners' claim that respondent only asserted "transferee liability" and not "donee liability" shows an improper understanding by petitioners of sec. 6901, because as we have just explained, sec. 6901 only creates a summary procedure by which respondent can collect the gift tax liability that arises under sec. 6324(b). Sec. 6901 creates neither a new source of substantive liability nor an independent basis for jurisdiction.

[10] In their replies, petitioners Lois W. Poinier and W. Page Wodell claimed they were not personally liable within the meaning of sec. 6324(b) because the 10-year lien imposed by that subsection had expired. However, this "liability is personal and exist[s] irrespective of any lien." *Moore v. Commissioner*, 146 F.2d 824, 826 (2d Cir. 1945), affg. 1 T.C. 14 (1942). Therefore, although it is true that the trust assets were no longer subject to the lien when the notices of liability were issued, petitioners' personal liability, and thus respondent's ability to assess and collect the tax due under sec. 6901, continued to exist.

tax to the extent of the value of such gift." (Emphasis added.) Under section 6601(e) "Any reference in this title * * * to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax." Thus, while section 6324(b) imposes a maximum ceiling on a donee's tax liability which is not to exceed the fair market value of the gift, the "tax" which is subject to this ceiling on liability includes not only the amount of tax that "is not paid on or before the last date prescribed for payment, [but also] interest on such amount at an annual rate established under section 6621 [which] shall be paid for the period from such last date to the date paid." Sec. 6601(a). Petitioner-donee-transferees assert that the interaction of these two sections operate to limit their total tax liability, including all accrued interest, to the fair market value of the trust's assets received by them. Respondent, however, asks us to apply the statutorily imposed limit on liability only to the underlying deficiency and the interest that accrued thereon from the last date prescribed for payment (April 15, 1971) until the date the notices of transferee liability were issued (June 25, 1981).[11] With respect to the interest that has accrued since these notices were issued, however, respondent asks us to treat such interest as if it is an independent liability that falls outside the liability limitation of section 6324(b).

At the time that the transferee provisions were originally enacted, the Senate proposed that a transferee's liability for a transferor's taxes plus interest and additions to tax should not in turn be subject to interest except in cases where the transferee filed a petition with the Board of Tax Appeals and was unsuccessful on such appeal. In such event, he would have been liable for interest "at the rate of 1 percent a month commencing with notice and demand for payment following the final decision of the Board." S. Rept. 52, 69th Cong., lst Sess. 30 (1926), 1939-1 C.B. (Part 2) 332, 355. Thus, the net result of the proposed amendment would have meant that the only post-transfer interest a transferee

[11]Such being the case, we have no need to delve into the intricacies of the possible liability of the petitioner-donee-transferees for an additional amount under State law for the use of money beyond the value limitation contained in sec. 6324(b). See *Patterson v. Sims*, 281 F.2d 577 (5th Cir. 1960); *Mysse v. Commissioner*, 57 T.C. 680, 703 (1972); *Estate of Stein v. Commissioner*, 37 T.C. 945, 959-962 (1962).

would have been liable for would have been *post-judgment* interest. That proposal was modified in conference. The Conference Committee report stated (H. Rept. 356, 69th Cong., 1st Sess. 44 (1926), 1939-1 C.B. (Part 2) 361, 372):

> Under the amendment the liability of the taxpayer for the tax, including all interest and penalties, is fixed as of the time of the transfer of the assets. No further interest subsequently accrues upon such liability as assumed by the transferee, except the interest under section 276(b) and (c) for failure to pay upon notice and demand after the outlined procedure has been completed and *interest at 6 per cent a year for reimbursing the Government at the usual rate for loss of the use of the money due it.* [Emphasis added.]

Moreover, the same report made it clear that a notice of transferee liability was to be considered as a notice of deficiency which in turn was to constitute the "notice and demand."

The rationale behind this is obvious. Congress' primary purpose in enacting the transferee enforcement provisions was to create a summary procedure by which respondent could enforce a transferee's liability "in the same manner as liability for a tax deficiency is enforced; that is, notice by the Commissioner to the transferee and opportunity to pay and sue for a refund or else to proceed before the Board of Tax Appeals, with review by the courts." H. Rept. 356, *supra* at 371. If a transferee pays the amount asserted in the notice of liability and then successsfully sues for a refund, the refund procedures apply and it would appear that the transferee would be entitled to interest under section 6611 to compensate him for the loss of the use of his money. See *Hodges v. United States*, 423 F. Supp. 754, 759 (E.D. La. 1976), affd. 597 F.2d 1014 (5th Cir. 1979); *Campbell Farming Corp. v. United States*, 132 Ct. Cl. 341, 132 F. Supp. 216 (1955). If the transferee chooses to petition this Court and ultimately is found liable, the Government should similarly be compensated for "the loss of the use of the money due it" as in the case of any taxpayer who contests a deficiency without prepayment. This implements the purpose of the change effectuated by the Conference Committee in 1926 and is the foundation of the sparse judicial authority which indicates that a transferee is liable for interest from and after issuance of the

notice of transferee liability at the rate specified in the Internal Revenue Code. *Patterson v. Sims*, 281 F.2d 577, 580-581 (5th Cir. 1960); *Estate of Stein v. Commissioner*, 37 T.C. 945, 959-960 (1962). We hold that respondent is entitled to interest at such rate from June 25, 1981.

We now turn to petitioners' requests that this Court offset any gift tax deficiency and transferee liabilities, which we determine, by refunds claimed due by the estate and petitioner-donee-transferees for previously paid estate and income taxes, respectively. Specifically, petitioners argue that any gift tax for which the decedent's estate is liable will be deductible as a claim against the estate under section 2053, thus eliminating decedent's taxable estate and entitling the estate to a refund of the estate taxes already paid in 1973. Additionally, petitioner-donee-transferees argue that they are entitled to income tax refunds for individual Federal income taxes they paid in earlier years on the sale of assets disclaimed by the decedent, particularly I.B.M. common stock. They contend that under section 1015(d)(1)(A) and section 1.1015-5, Income Tax Regs., the basis of these assets will be increased by the amount of gift tax to be paid with respect to the transfer of such assets and therefore their reported gain on the sale of such assets will be reduced. They ask us to offset these refunds of income tax against their transferee liabilities. For the reasons set out below, we cannot honor petitioners' requests.

With respect to any deduction for the gift tax deficiency which we have determined, we believe this should be disposed of in the course of entering a decision in the estate tax proceedings presently pending before the Court in docket No. 7099-76 (*supra*, p. 483), including the disposition of any overpayment for which a claim is made therein.

With respect to the offsets of refunds of income taxes against petitioners' transferee liabilities, we are without jurisdiction to do so. Section 6214(b) provides that:

> The Tax Court in redetermining a deficiency of income tax for any taxable year or of a gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, *but in doing so shall have no jurisdiction to*

determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid. [Emphasis added.]

Since respondent determined the deficiency in gift tax for the calendar year ended December 31, 1970, and because the claimed overpayments were all made with respect to taxes paid for calendar years other than 1970, section 6214(b) makes it clear that we are without jurisdiction to effectuate such offsets.[12] Our lack of jurisdiction to offset individual tax liabilities of the transferees against their transferee liabilities has also been judicially established. *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943); *Vandenberge v. Commissioner*, 3 T.C. 321, 327-328 (1944), affd. 147 F.2d 167 (5th Cir. 1945). Nor was the Court's jurisdiction enlarged to encompass such offsets when it was made an article 1 Court by the Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487. *Continental Equities, Inc. v. Commissioner*, 551 F.2d 74, 82-84 (5th Cir. 1977).

Petitioners also ask us to take into account in entering our decisions herein certain prepayments made to respondent in 1982 and 1983, after the commencement of proceedings herein, which the petitioners designated as interest under Rev. Proc. 82-51, 1982-2 C.B. 839. Respondent opposes our consideration of this issue at this time for a variety of reasons, including lack of jurisdiction. In view of the request in petitioners' opening brief that the amounts so designated as interest be applied against the limit of liability of petitioner-donee-transferees Lois W. Poinier and W. Page Wodell under section 6324(b), it seems clear that such payments to the extent that they were in fact interest (as to which we express no opinion) were intended to be designated as interest on the decedent-transferor's gift tax liability. However, the amount of the gift tax deficiency determined herein against the decedent-transferor (exclusive of interest thereon) will approximate the limit of the petitioner-donee-transferees' liabilities under section 6324(b). Under these circumstances, we think what petitioners are asking us in effect to do is to establish for them the nature

[12] With respect to the sale of the trust assets, income taxes were paid by Lois W. Poinier for the calendar years 1971 and 1973, and by W. Page Wodell for the calendar years 1973 and 1976.

of their payments in 1982 and 1983 in order to provide them with ammunition to claim deductions for interest paid in those years in determining their income tax liabilities. This we are satisfied that we are without jurisdiction so to do, since there is no proceeding with respect to the income tax liabilities of any of the petitioners.

To reflect the foregoing,

Decisions will be entered under Rule 155.